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Reply to: Columbia

April 6, 2018

VIA CERTIFIED U.S. MAIL

Ms. Mary Shahid
Nexsen Pruet, LLC
205 King Street
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Dear Ms. Shahid:

This letter is in reference to your letter, dated January 25, 2018, on behalf of your client, The Honorable Henry E. Brown, Jr., regarding his property at Pine Hope Plantation, located on S.C. Hwy 402, near Cordesville, Berkeley County, South Carolina (the "Site").

As your letter indicates, regulatory staff of the U.S. Army Corps of Engineers, Charleston District ("Corps"), as well as the South Carolina Forestry Commission ("SCFC"), conducted a site visit with your client on November 21, 2017. During the course of the site visit, the Corps confirmed the presence of ongoing violations of Section 404 the Clean Water Act ("CWA") at the Site. These continuing CWA violations can be characterized as the excavation of ditches (and subsequent discharge by sidecasting excavated material for the roadbase) that continues to drain a Carolina bay for the purposes of a silviculture operation, and the unauthorized discharge of fill material for purposes of road crossings and water control that resulted in the impoundment of Mary Anne Branch, a perennial Relatively Permanent Water ("RPW"), for aesthetic purposes and fire suppression.

The activities at the Site do not meet the exemption criteria of Section 404(f)(1), as implemented through Corps regulations at 33 C.F.R. § 323.4. During the aforementioned

site visit, the Corps found evidence of conversion of wetland areas within the Carolina bay to non-wetland areas, as a result of the lateral ditching activities within the Carolina bay. In addition, the constructed forestry roads neighboring the drainage features were observed to impair "flow and circulation patterns and chemical and biological characteristics of waters of the United States." 33 C.F.R. § 323.4(a)(6). Specifically, these road features have aided in the conversion of the wetlands within the Carolina bay to non-wetland areas, as the roads are preventing flow and circulation of water between the drainage features and the adjacent wetland area. Lastly, the impoundment of Mary Anne Branch, a U.S. Geological Survey ("USGS") mapped blue-line stream, is not an exempt activity pursuant to Section 404(f). In this regard, I also note the findings of the SCFC's letter dated February 20, 2018 (*i.e.*, that the canals constructed on the southern portion of the Site were not compliant with SCFC Best Management Practices), as discussed below.

At the behest of the Corps, a meeting was held on December 14, 2017, to discuss the Corps' findings, as well as possible resolution options. In summary, the Corps suggested a package of potential resolution measures that would resolve this matter, as follows:

- 1) Cap the lateral drainage features within the Carolina bay at their confluence with the impoundment of Mary Anne Branch in order to prevent downstream flow;
- 2) Provide sufficient flow-thru measures in the forestry roads in order to re-establish hydrological connectivity from the lateral drainage features to the Carolina bay;
- 3) Reshape the lateral drainage features in order to reduce the flow capacity of the lateral drainage features in order to reduce drainage effects of the lateral drainage features. (Note: Preferably, this would be accomplished by pushing the road material, which was constructed from the excavated material, back into the lateral drainage ditches. Subsequent re-grading of the road bed could occur upon completion to provide continued use and access.); and,
- 4) Present onsite and/or offsite site protection instruments (*e.g.*, restrictive covenants) as compensatory mitigation to offset impacts from the discharge of fill material in wetlands and impoundment of Mary Anne Branch on the Site. Suggested methodology includes preserving portions of Mary Anne Branch and/or Bullhead Run as they flow through additional property owned by Pine Hope, LLC to the north of the Site, as well as preserving appropriate wetland acreage on the additional property. (Note: Alternative preservation and/or enhancement/restoration mitigation measures were not discussed, but would be considered by the Corps, if presented.)

Your January 25, 2018 letter proposes a resolution of the CWA violation along the following lines:

- installing a singular ditch plug in the impoundment of Mary Anne Branch, and installing three pipes within the forestry roads in order to restore hydrology to the Carolina bay (Exhibit A);
- preserving a 6,654' long buffer, with an average width of 35', along the Site's boundary with the U.S. Forest Service; and,
- concluding that many of the activities that have taken place on the Site are exempt from regulation under the CWA, as "normal silviculture" practices that meet the requirements of SCFC Best Management Practices ("BMPs").

The foregoing elements of your proposed resolution are deficient in addressing unauthorized impacts to waters of the United States. To begin with, the information you provided does not adequately demonstrate that the proposed action of installing a singular ditch plug to Mary Anne Branch and installing three pipes within the Carolina bay and lateral drainage features will restore hydrologic connectivity and fully reverse the ongoing conversion of wetlands within the Carolina bay to non-wetlands. While we are willing to consider additional analysis from your forestry consultant, Mr. Mac Baughman, to support this as your solitary proposed restoration action, we do not believe this will prove sufficient. We continue to believe that additional restorative measures, as listed above, must be part of any resolution in order to re-establish hydrological connectivity and reverse the wetland conversion.

Second, the proposed onsite preservation of an approximately 5.3 acre buffer with the U.S. Forest Service fails to adequately compensate for the impacts of the unauthorized discharges of fill material within jurisdictional wetlands at the Site and the impoundment of Mary Anne Branch. To the extent onsite (or offsite) preservation is offered by your client as a part of a proposed resolution of this matter, we believe that additional preservation acreage is merited and should be offered due to the scope of the unauthorized activities, and that such preservation must be accomplished through a Corps-approved site protection instrument, such as the Corps' model restrictive covenants.

Further, with regard to your position that your client's silviculture practices are compliant with SCFC BMPs, the SCFC's letter dated February 20, 2018, addressed such practices at the Site, and made the following findings: (1) the lateral drainage ditches were "excessive for minor drainage" and "not considered a normal practice"; (2) the lateral drainage ditches were having apparent hydrologic effects within the Carolina bay; (3) the forestry roads were reducing hydrologic connectivity along between the lateral drainage ditches and Carolina bay; and (4) the direct connection of the linear drainage features into a perennial or intermittent stream (*i.e.*, Mary Anne Branch) was not in compliance with SCFC BMPs.

Finally, with regard to the statement in your January 25th letter that your client “is not inclined to mitigate for matters that may be considered exempt and are likely to be excluded by the statute of limitations,” I would refer you back to the Corps and SCFC’s individual findings above regarding the existence of ongoing, non-exempt silviculture operations at the Site, as well as the Fourth Circuit’s position that “[e]ach day the pollutant remains in the wetlands without a permit constitutes an additional day of violation.” *Sasser v. Adm’r, U.S. E.P.A.*, 990 F.2d 127, 129 (4th Cir. 1993); *Ohio Valley Environmental Coal., Inc. v. Hernshaw Partners, LLC*, 984 F.Supp.2d 589, 598 (S.D.W.Va. 2013) (“... one may continue to be in violation of the Clean Water Act even if the activities that caused the violations have ceased.”). Indeed, your January 25th letter acknowledges the “existence of [an] on-going silviculture operation at Pine Hope.” January 25th letter at p.2 (emphasis added).¹

I would also note the implications of your letter, dated October 13, 2017, which states that, “[e]ven if there is disagreement regarding the applicability of the silviculture exemption, much of the activity, and most of the larger scale excavation and fill activity is timebarred by 28 U.S.C § 2462 for occurring prior to September 9, 2009.” October 13th letter at p.5 (emphasis added). This statement implicitly acknowledges that some of the unauthorized activities at the Site (e.g., circa 2014) are *not* timebarred according to your calculation of the alleged statute of limitations period. And even assuming *arguendo* that you are correct in your assertion that “28 U.S.C. § 2462 bars pursuit of any claim occurring before September 9, 2009,” as stated in your October 13th letter at p.6-7, I would also note that “[v]arious courts, including [district courts in the Fourth Circuit], have held that § 2462 does not apply to injunctive relief” under the Clean Water Act. *U.S. v. Sea Bay Development Corp.*, No. 2:06cv624, 2007 WL 1378544, at *3 (E.D.Va. May 8, 2007) (citing *U.S. v. Hobbs*, 736 F.Supp. 1406, 1410 (E.D.Va. 1990)).

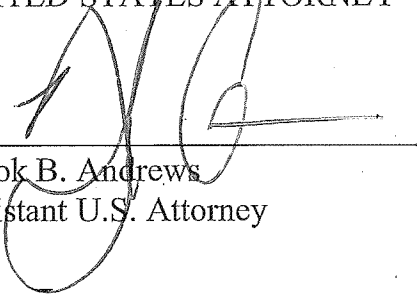
Accordingly, your proposed commitments fail to adequately resolve the continuing CWA violations that are associated with an on-going, non-exempt silviculture operation at the Site. At this time, your client is strongly encouraged to provide revised voluntary onsite restoration measures and compensatory mitigation as described in, or similar in nature to, items 1-4 above. Please respond in writing with your client’s position no later than April 27, 2018.

In closing, I welcome your cooperation to resolve this matter without involving the court. However, if we are unable to find an agreeable resolution to this matter in the near future, I will move forward with legal action seeking civil penalties and injunctive relief (including without limitation site restoration and mitigation). My direct number is (803) 929-3056.

¹ Your January 25th letter further states that, “[t]his letter is in response to matters ... related to activities undertaken as part of an ongoing and active silviculture operation at Pine Hope Plantation ...” January 25th letter at p.1 (emphasis added).

Yours very truly,

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